1955

Thomas F. Kirkham v. Orien A. Spencer and Viola Spencer : Brief of Respondent

Utah Supreme Court

Glenn M. Acomb; Harvard R. Hinton; Attorneys for Plaintiff and Respondents;

In the Supreme Court of the State of Utah

THOMAS F. KIRKHAM, Administrator of the Estate of William Kirkham, Deceased,
Plaintiff and Respondent,

vs.

ORIEN A. SPENCER and VIOLA SPENCER, his wife,
Defendants and Appellants.

Case No. 8291

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

The Respondent agrees with the statement of facts set out in appellants' brief, but deem it necessary to make a more detailed statement concerning the evidence and testimony of the witnesses than was contained in said brief. We will, therefore, undertake to set forth the facts as developed by both parties.

The Respondent was granted judgment on his complaint on file herein for unlawful detainer in the Fourth Judicial District Court. From this judgment the defendants appealed.

The facts are as follows:

That on or about January 25, 1952, the deceased, William Kirkham, entered into a written contract of sale of real property to the defendants, Orien A. Spencer and Viola Spencer, his wife, which property is the subject of this action and is correctly described in paragraph 3 of the complaint. The contract provided for payment by the purchasers of $65.00 per month, or more, commencing on February 1, 1952, together with interest at 5% per annum on the unpaid balance. The monthly payments were to be applied first to interest upon the unpaid balance, and then the balance being applied to principal. The defendants went into possession under the contract, the original of which is plaintiff's exhibit A in the record, and have continued to occupy the premises since that time.

Pretrial was held on the 8th day of October, 1954, wherein the parties were properly represented by their counsel. A stipulation was entered into by counsel and accepted by the Court through a pre-trial order. It was stipulated among other things that the plaintiff, Thomas F. Kirkham, is the duly appointed, qualified and acting administrator of the Estate of William Kirkham, deceased, having been appointed on October 2, 1953. That the contract of sale hereinbefore described is accurate. The only issue of fact reserved for trial was stated in the pretrial order as follows:

> "(1) Did the defendants pay to the plaintiff's decedent during the month of August, 1953, the sum of $4800.00."

The evidence pertinent to this issue presented at trial is

as follows: Plaintiff Thomas F. Kirkham, Administrator of the Estate of William Kirkham, deceased, testified that he was a brother of the deceased; that he made up the contracts, made all interest calculations; made his bank deposits and acted as consultant on many business deals for 10 years or more for the deceased; and that this relationship lasted up until the death of William Kirkham (Tr. P. 4).

Plaintiff's exhibit C is the bank book of the deceased showing deposits from 1942 to September 5, 1953 and plaintiff testified that he made all of those deposits (Tr. P. 5).

William Kirkham died on September 6, 1953 as a result of a sudden stroke.

Plaintiff further testified that he went on vacation in August, 1953 and returned home August 22, 1953, the day after the date shown on defendants' exhibit 3. Two or three days later William Kirkham came to him and expressed a concern about the delinquent Spencer contract. Plaintiff recommended that he quit worrying and turn the contract over to the attorney he had before for collection (Tr. P. 9). That the papers were delivered about a week after his return from vacation to Attorney Harvard R. Hinton with instructions to collect the same, making the date of delivery approximately August 30, 1953 (Tr. P. 10, 11).

That as administrator he collected the assets of the estate and filed an inventory; that he did not collect $4800.00, nor was any large sum of money found in deceased's assets or belongings (Tr. P. 12) and that no other bank account was ever found in the name of the decedent (Tr. P. 13).

That plaintiff always prepared deeds for his brother's real estate transactions and that he was never requested by his brother to prepare any deed for defendants nor was he ever requested to make any interest calculations in regard to payment of the Spencer contract (Tr. P. 13).

That the contract marked exhbiit A was a part of the assets of the estate and is the same contract that was turned over to the attorney for collection (Tr. P. 14).

Cleo K. Beagley, a daughter of the deceased, testified that she participated in collecting the assets of the estate along with the rest of the members of the family and went through their father's belongings and turned the papers over to the Administrator (Tr. p. 38). And further that they went through everything, making a thorough search and did not find any cash (Tr. p. 39). That her family consisted of her and her sister and two brothers.

At the conclusion of Mrs. Beagley's testimony plaintiff rested and defendant made a motion to dismiss on the grounds that a prima facie case had not been proved. The trial judge ruled "That there was a prima facie case made that the $4800.00 was not paid. It is not included in the accounts, the witnesses did not find it, and therefore the motion is denied" (Tr. p. 43).

Thereupon defendants called Mr. Creel, a handwriting expert, who testified that the signature on defendants' exhibit 3, the purported receipt, was that of William Kirkham, the deceased. At this time counsel for defendants stipulated that the handwriting on the remainder of the purported receipt was not the same handwriting as the signature (Tr. p. 48).

Defendant Orien Spencer was sworn as a witness but was not allowed to testify as to dealings regarding defendants' exhibit No. 3 under the so-called "dead man's" statute. Counsel for defendant did not attempt to introduce any competent, relevant evidence concerning the issue before the court and thereupon rested.

Plaintiff in rebuttal called Harvard R. Hinton to the witness stand and he testfiied that a delinquent contract between William Kirkham and Orien Spencer and his wife was delivered to him on August 29th or 30th for collection purposes. That he wrote and mailed a letter on September 1, 1953 to the defendant Orien Spencer regarding this contract and that Spencer did not come around to see about it until September 29th (Tr. p. 54, 55).

The court thereafter on its own motion ordered the matter reopened for further evidence after having taken the case under advisement. The order of the court came after it had examined and weighed the evidence presented and was not satisfied on two points available to the parties. Indicating that this evidence would be of great assistance to the court in determining the merits of the cause, it ordered the rest of the parties set aside in order to give the respective parties an opportunity to present evidence on the two points, namely: "(1) Evidence concerning the possession by the defendants of the sum of $4800.00 in cash which could have been, or which probably was, paid to deceased on or about the 21st day of August, 1953. (2) Further evidence of the search by plaintiff and/or the heirs of the decedent made either before or after the bringing on of the cause for trial to discover the possession

of $4800.00 in money in the decedent after the 21st day of August, 1953, including banks in the cities of Lehi, American Fork, Pleasant Grove, Provo, and Salt Lake City, and a more detailed search of the premises wherein deceased lived after August 21, 1953, and any other locations known to the heirs and representatives of the decedent wherein the said decedent might have made temporary disposition of $4800.00 paid to him prior to plaintiff's return from vacation on August 22, 1953."

The defendants were represented by counsel in court at the time set for hearing after reopening. Defendants' attorney suggested that plaintiff's witnesses be heard regarding the new evidence the plaintiff had to offer (T. p. 66). Later counsel voiced an objection to plaintiff being allowed to re-open his case. This motion was denied.

The Administrator Thomas F. Kirkham was recalled to the witness stand and testified regarding the number of rooms in decedent's house and that the yard was very small. And further that since his appointment as administrator he has never had any statement, letter, or communication whatever, from any person or institution, indicating that there were any additional funds in the estate, other than what had been reported (Tr. p. 70, 71).

Letters from 17 banking institutions including American Fork, Pleasant Grove, Provo, Midvale and Salt Lake City in Utah and Salt Lake Counties were then placed in evidence through the testimony of Thomas F. Kirkham, Cleo K. Beagley and Harvard R. Hinton (Tr. p. 72, 79, 85, 98, 99). All letters

stated that William Kirkham did not have an account in their institutions.

Cleo Beagley, in testifying of the completeness of the search conducted in the decedent's home, stated they went through every room completely, one room at a time, and searched the contests including cupboards, rugs, bedding and pillows (Tr. p. 86, 87). That no money, safety deposit keys or bank statements other than to the Lehi Bank were found.

Mr. Leslie Goates, son-in-law of the deceased, was present at the time the intensive search was made and he reiterated what Mrs. Beagley said as to the thoroughness of the search (Tr. p. 94).

Defendants' motion to dismiss on grounds of lack of prima facie case was again denied (Tr. p. 100). Defendants were to present their evidence as requested by the Court on November 6, 1954 at 10:00 a.m.

On November 5, 1954 counsel appeared in court by stipulation and counsel for defendants rested without presenting further evidence as requested by the court. Counsel for plaintiff thereupon made a motion to reopen case to present further evidence, which evidence he had been reserving for rebuttal purposes and his motion was denied.

STATEMENT OF POINTS

Throughout the remainder of this brief plaintiff will be referred to as respondents and defendants as appellants.

The respondents will argue appellants' points in the order in which they appear in appellants' brief.

ARGUMENT

POINT ONE

DEFENDANTS' MOTION TO DISMISS AT THE END OF THE PLAINTIFF'S CASE IN CHIEF SHOULD NOT HAVE BEEN GRANTED FOR THE REASON THAT THE PLAINTIFF PROVED A CAUSE OF ACTION AND FOR THE REASON THAT THE EVIDENCE PROVED WAS SUFFICIENT FOR THE COURT TO REFUSE TO GRANT THE RELIEF PRAYED FOR.

The appellants contend that it was incumbent upon the part of the respondent to prove the non-payment during the month of August, 1953 the sum of $4800.00 as an essential element of their cause of action.

The respondents contend the instant case was an action for unlawful detainer of real property located at Lehi, Utah.

The allegations and proof of a complaint necessary to sustain a cause of action for unlawful detainer are clearly set forth in the following decisions of this court:

Madsen vs. Chournos, 104 U. 280, 139 P. 2nd 225
Buchanan vs. Crites, 106 U. 428, 150 P. 2nd 100, 104
Glenn vs. Keyes, 107 U. 415, 154 P. 2nd 642

It is to be noted that all of the allegations of the complaint on file herein were admitted by the appellants either in their

answer to the complaint or in the stipulations entered into among the respective parties at the pretrial of the action with the exception of non-payment.

It is to be further noted that the only issue of fact reserved for trial as set forth in the pretrial order was stated thus: "Did the defendants pay to the plaintiff's decedent during the month of August, 1953 the sum of $4800.00?"—a fact that was raised by the appellants' affirmative defense as set forth in their answer to the complaint on file herein.

The evidence established by the respondent clearly and unmistakeably supports the trial court's finding of fact that the defendant did *not* pay to the plaintiff's decedent during the month of August, 1953 the sum of $4800.00.

Said evidence may be summarized as follows:

Thomas F. Kirkham, Administrator of the Estate of William Kirkham, deceased, plaintiff in the case below, testified that he was a brother of the decedent and that for more than 10 years prior to the death of William Kirkham, deceased, that he conducted a great deal of decedent's business. He further testified that he made all of the contracts for the decedent, including the plaintiff's exhibit A. That he made all interest calculations on contracts for him; that he prepared deeds and other documents for the decedent and that he did all of his banking for him. The bank passbook, plaintiff's exhibit C, was identified by the witness Thomas F. Kirkham as the book used in making these bank deposits. That book shows that over 50 deposits were made during the period of 10 years, the amounts ranging from $17.50, the lowest, to as high as

$6000.00. The decedent died on September 6, 1953. Mr. Harvard R. Hinton, who is an attorney for the plaintiff in this action, was also counsel for the decedent prior to his death. In the forepart of August, 1953, Thomas F. Kirkham, Administrator herein, departed on a vacation trip, returning on Saturday, August 22, 1953. In the first part of the week following, the decedent came to the plaintiff administrator and expressed some concern over the delinquencies upon contracts, specifically mentioning the Spencer contract. Thomas F. Kirkham advised the decedent then to turn his contracts, including the Spencer contract, over to his attorney and quit worrying about them. Thereafter, either on August 29th or August 30th, (after the alleged payment of August 21) the Spencer contract was delivered to Attorney Hinton with instructions to collect the delinquencies upon the same. Mr. Hinton then on or about September 1, 1953 wrote a letter to the defendants concerning their delinquency on this contract but the defendant did nothing whatsoever about the matter until September 29th (nearly a month later) when they came to see Mr. Hinton and there for the first time claimed payment of $4800.00.

As has been stated by the appellants in their brief, evidence supporting a claim of non-payment is usually accomplished by the testimony of an obligee that payment was not made.

In the instant case the obligee, William Kirkham, is dead. Therefore his actions with respect to the issues of this case *after* the date of the alleged payment, August 21, 1953 and *prior* to his decease on September 6, 1953 are of primary importance.

The evidence without conflict shows that the deceased as far as was ascertainable was in good health all during the month of August and in the forepart of September, 1953. He suffered a sudden stroke on the 4th of September, which rendered him immediately unconscious, resulting in his death on September 6, 1953. And further evidence shows that the deceased never at any time requested his brother Thomas F. Kirkham to prepare a deed for him to be delivered to the defendants in fulfillment of their contract, and never at any time did the deceased ask his brother to make interest calculations on the defendants' contract. As a matter of fact, the evidence as herein stated before, clearly shows that the decedent after the date of the alleged payment and prior to his decease complained of delinquencies of the Spencer contract to his brother, who normally conducted all of his business for him including the preparation of deeds and the calculation of interest, and delivered said contract to his attorney to collect said delinquencies. The bank pass book, plaintiff's exhibit C, further shows that no such sums as claimed by the defendants to have been paid to the decedent were deposited to his account, and that the decedent did not deliver any such sum of money to Thomas F. Kirkham, Administrator. The evidence further shows that a complete and thorough search of the premises wherein the decedent resided and inquiries at seventeen banks in Utah and Salt Lake Counties were made (the most likely places that the decedent would have deposited any money if such deposit had been made) and that no evidence of money, bnk deposit books or safety deposit box keys was found to indicate that the decedent had ever received the $4800.00 in question.

It is the contention of the respondent that the evidence of the case clearly supports and proves the allegations of an unlawful detainer action, including the fact of nonpayment as shown by the actions of the decedent and testimony of witnesses during the trial in the lower court.

It is often said that the burden of proof is upon the party having in form the affirmative allegation, but the burden of going forward with the proof shifts many times during the trial from one party to another party. In the instant case the appellants claim payment as an affirmative defense in their pleadings; therefore, the burden of going forward to convince the trier of facts that payment was made shifts to the appellants. The appellants were the parties who presumably had the peculiar means of knowledge which would enable them to prove payment but this in fact they failed to do.

All throughout the appellants' brief they have labored extensively on speculation and fanciful imagination, even quoting statements of the court as to what could have been, or which probably was, which statements were made prior to the court's finding and judgment.

The following decisions clearly indicate that such statements have no bearing upon the court's final finding and judgment:

> "Oral antecedent expressions of opinion by a trial court inconsistent with findings, conclusions and decree ultimately rendered in writing do not affect the final judgment."
>
> *In Re Roth's Estate,* 269 P 2nd. 278, 2 U. 2nd. 40.
>
> "Oral statements of opinion by the Trial Judge made in connection with a ruling do not constitute

findings nor judgment and will not modify or affect them if the ruling, findings, order or judgment is otherwise sound."

Wheat v. Denver R. G. & W. RR. Co., 2500 P. 2nd 932.

"At the conclusion of the evidence the curt rendered an oral opinion expressing his views . . . Such opinion of course is not the decision of the case and may not be regarded as such . . . the decision of a case consists of the findings, conclusions, and decree; . . . such reasons are not binding on the reviewing Court and may not be considered as controlling the findings nor as supplying a want of them,"

Stevens & Wallis v. Golden Porphyry Mines Co., 18 P. 2nd 903, 904 81 U. 414.

"Oral statements of opinion by the trial court inconsistent with the findings and conclusions ultimately rendered do not affect the final judgment."

McCollum v. Clothier, 241 P. 2nd 468, 472.

Also to the same effect, *Palfreyman v. Bates & Rogers Construction Co.,* 108 U. 142, 158 P. 2nd 132.

In the McCollum case the court greatly exceeded the statement of the Court made in the instant case prior to judgment. in that it orally informed the defendants that it would rule in defendants' favor, stating that it would not be necessary for the defedants to procure an additional contemplated witness. It later developed that the court changed its mind and ruled in favor of the plaintiff even though defendant's contemplated witness died without being given opportunity to testify and the decision was nevertheless upheld by the Supreme Court in the following words:

"The fact that the trial court changed his mind and entered a judgment contrary to his orally announced decision at the time the case was submitted, cannot be the basis for overturning the judgment. The only judgment that can be given effect is the one entered in acordance with law. * * * no antecedent expressions of the judge can in any way restrict his absolute power to declare his final conclusion, in the only manner authorized by law, to wit, by filing his decision (findings of fact and conclusions of law * * *"

McCollum v. Clothier, 241 P. 2nd P. 472

The findings of fact by the trial court pertinent to the issue in question was that the defendants did *not* pay to the plaintiff's decedent during the month of August, 1953 the sum of $4800.00. The above stated finding of fact was supported by abundant competent evidence.

A Utah case decided in 1953 held that the Supreme Court cannot disturb the trial court findings of fact if there is any competent evidence to support the findings. *Seamons vs. Anderson,* 252 P. 2nd 209.

Other Utah cases where the same doctrine is applied are:

Beagley vs. U. S. Gypsum Co., 235 P. 2nd 783.

Tacea Tsouras vs. Brighton & North Point Irrig Co., 227 P. 2nd 329

Garrett Freight Lines vs. Cornwall, 232 P. 2nd 786

Williams vs. Ogden Union Ry & Depot Co., 230 P. 2nd 315

It has been further held that:

"The Supreme Court will not redetermine facts found by the fact finder in a lower court in law cases

if, in the light most favorable to the respondent, the evidence is sufficient to sustain such findings."

Gibbons & Reed Co. v. Guthrie, 256 P 2nd 706.

"On appeal, prevailing party in case at law is entitled to benefit of evidence in light most favorable to him, together with every inference and intendment fairly and reasonably arising therefrom."

Nasner v. Burton, 272 P. 2nd. 163, 2 U. 2nd 236.

Also *Weenig Bros. v. Manning,* 262 P. 2nd, 491, 1 U. 2nd 101.

POINT TWO

DEFENDANTS' MOTION TO DISMISS THE PLAINTIFF'S CASE AND FOR JUDGMENT FOR THE DEFENDANTS ATER BOTH PARTIES HAD RESTED SHOULD NOT HAVE BEEN GRANTED FOR THE REASON THAT THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN A JUDGMENT FOR THE PLAINTIFF AND THE EVIDENCE PRESENTD BY THE DEFENDANTS WAS NOT PRIMA FACIE EVIDENCE OF PAYMENT AND WAS REFUTED BY THE PLAINTIFF.

What we have stated under Point One is also applicable to Point Two.

The appellants contend that by the introduction of defendants' exhibit No. 3 they had proved a prima facie case of payment and that the respondents did not offer any scintilla of evidence to rebut the exhibit.

Respondents deny appellants' contention on both counts.

The case of *Gallaher vs. Theilbar Realties,* 18 P. 2nd 1101, 93 Mont. 421, cited by the appellants in support of their argument may be distinguished from the case at hand in that the court was called upon to determine as a matter of law whether or not the *uncontradicted* evidence to the effect that an individual agreed to settle in court an account by paying part thereof in cash and giving his personal note for the balance, and that the other party upon receipt of the cash and note voluntarily receipted the statement of the account, constituted payment. Whereas in the instant case the appellants are asking this court to determine the *sufficiency* of the evidence of respondents which was most certainly abundant and contradictory to that of the appellants.

The evidence recited in Point One pertaining to the circumstances and conduct of the deceased *after* the date of the alleged payment and *prior* to the date of his decease; the failure of the defendants or appellants to reply to a demand for payment or to make any statement whatsoever for over a month after the alleged payment; the testimony of Thomas F. Kirkham, Administrator of the Estate of William Kirkham, deceased, relating to the Spencer contract; the bank deposit books; the testimony of the heirs relating to the search of decedent's belongings; the testimony of Attorney Harvard R. Hintor and all other evidence submitted on behalf of the respondents clearly contradict and rebut the so-called evidence of defendants' exhibit No. 3.

The physical evidence of defendants' exhibit No. 3 shows that the *signature only* was in decedent's handwriting and it

was stipulated by the appellants that the body of this exhibit was *not* in the decedent's handwriting. As a matter of fact, the signature and body were written by different pencils as well as by different hands.

The trial court in its analysis of the case states, "It is more than passing strange, that where a receipt is written in lead pencil, at a time when $4800.00 was being paid, that the payor, or someone in his behalf would use one pencil to make the body of the receipt, and the signer would then use another pencil in signing his name thereto."

There was not one scintilla of evidence offered by the appellants concerning their exhibit No. 3 with relation to anything other than the signature. There was no evidence presented concerning the drafting of this exhibit, the place of payment, means of payment, or any evidence whatsoever surrounding this exhibit other than the signature.

When the physical facts of this exhibit are considered in light of the facts determined by the evidence as presented in Point One and elsewhere throughout this brief, speculation as to what might have been or which was probably done ceases to be. We are then left with the findings of fact by the court that the claimed payment of $4800.00 was never paid, and that the receipt, defendants' exhibit No. 3, even though it bears the true signature of the decedent (which gives full credit to defendants' only evidence) is false, forged and counterfeit, which findings are clearly supported by abundant, competent evidence.

Appellants certainly did not prove by any preponderance of evidence a genuineness of any receipt. The findings by the

court based on competent evidence that defendants' exhibit No. 3 is false, forged and counterfeit places the appellants' arguments concerning a so-called "receipt" outside of the scope of the issues before this court as all of appellants' arguments presuppose a valid receipt whereas a genuine receipt supported by evidence never existed, as was determined by the court.

The Utah cases cited under Point One holding that the Supreme Court cannot disturb the trial court's finding of fact if there is any competent evidence to support the findings is also applicable here.

A very recent Utah case, *Kimball Elevator Co. v. Elevator Supplies Co.,* 272 P. 2nd 583, 2 U. 2nd 289, states:

> "On appeal from judgment for plaintiffs, Supreme Court was required to take all the evidence and every reasonable inference therefrom in light most favorable to plaintiffs."
>
> * The general rule is that a verdict willl not be set aside on the ground of insufficiency of evidence if the evidence substantially supports it. "There must be an absence of evidence against the defendants or a decided preponderance in his favor. In other words, the v erdict must be plainly wrong and manifestly against the weight of the evidence to warrant the court in setting it aside."
>
> *People v. Swasey,* 6 U. 93, 21 P 400

Also see *United States v. Brown*, 6 U., 115, 21 P. 461

POINT THREE

THE COURT DID NOT ERR IN RE-OPENING THE CASE ON ITS OWN MOTION AND IN DESIGNATING THE MANNER, KIND AND AMOUNT OF EVIDENCE THAT WOULD BE REQUIRED BY THE COURT.

The mere fact that appellants have been unable to find authorities to support the action of the court in matters of reopening the case where the initiating source was the court itself certainly does not make it an abuse of discretion on the part of the court.

That a judge has no burden or duty to call forth evidence is plain in the law. But the general judicial power itself, expressly allotted in every st ate constitution impries inherently a power to investigate as auxiliary to the power to decide; and the power to investigate implies necessarily the power to summon and to question witnesses. If the court has such inherent power then the power to reopen a case on its own motion in order to make a proper judicial determination certainly must be one of its inherent powers.

Respondent agrees with the appellants that a broad latitude and discretion is allowed the trial court in reopening a case.

Appellants' contention that a motion to reopen is *always* made by one of the parties and is ordinarily based on newly discovered evidence is not shared by the respondent.

It was held in *Holn vs. Pauly,* 106 P. 266, 11 Cal. App. 724,

> "Where, after submission, the judge, after suggesting it himself, reopened the case for further evidence,

it will be presumed that it was in furtherance of a desire to reach a just conclusion upon the merits, and, both parties having the same opportunity to offer additional evidence, he will be deemed to have acted within his discretion, especially where it is at least doutbful whether the additional evidence strengthens materially the successful party's case."

That a court may of its own motion reopen a case is implied from the following:

> "Where the court reopens the case on motion, the character of the showing made in support of the motion is immaterial, since the court may, of its own motion, reopen the case." 88 Corpus Juris Secundum, 220 par. 104.

See also *Badoner vs. Guaranty Trust, etc., Bank,* 200 P. 638; and *Rutledge vs. Barger,* 255 P. 537.

That the court did not abuse its discretion could not be more clearly stated than the following statement from 88 *Corpus Juris Secundum* 222, par. 106:

> "It cannot be considered an abuse of discretion to reopen a case for further evidence where the adverse party suffers no injustice, or where the court permits him the same latitude in introducing further evidence where it is necessary to reopen to supply evidence material to the case and necessary for its proper disposition, or where the evidence is newly discovered."
>
> *Mohawk Carpet Mills v. State,* 17 N. Y. 2nd 780
>
> *Chapman v. Associated Transport,* 63 S.E. 2nd 465.

How can the appellants contend they were harmed or prejudiced when they were granted the same opportunties and latitudes as the respondents. The fact that they did not

avail themselves of this opportunity was not prejudicial to their interest when they were granted the same rights and privileges as were the respondents.

There is no conflict as to the broad latitude and discretion allowed a trial court in matters of reopening a case.

The appellants contend that there was a clear abuse of discretion in that the Court itself initiated the reopening of the case in order to hear further evidence necessary to the ends of justice.

An appellate court will interfere only where there has been a clear abuse of discretion. How can there be such a clear abuse when the sole purpose of reopening was in the furtherance of the interest of justice and both parties given equal opportunities to offer evidence and be heard?

A judge is not a mere passive figure who must rely solely upon the actions of attorneys for his determinations. He may even on his own call forth witnesses and interrogate them in order that the ends of justice may be met.

The following excerpts from 53 *Am. Jur.* 109-110, Sec. 123, 124, state very clearly the broad discretion allowed a trial court in matters of reopening a case:

> "While a party should in giving his evidence in chief, offer all evidence at his command in support of his case, and as a general rule is thereafter confined to rebutting evidence, it is within the sound discretion of the trial court in the furtherance of the interests of justice after the parties have rested to permit either party to reopen a case, for the purpose of receiving further evidence. . . . In the discretion of the Court a case may be reopened and additional

evidence introduced after a motion for a nonsuit or for a directed verdict, after a demurrer to the evidence has been made, or during argument of counsel, even after the conclusion of the argument. The exigencies of each particular case go far in controlling the discretion of the court in this regard, although it has been said that the court should not reopen a case except for good reasons and on proper showing, it is not, on the other hand, justified in closing the case until all the evidence, offered in good faith and necessary to the ends of justice, has been heard.

" . . . An appellate court will interfere only where there has been a clear abuse of discretion."

"It is common practice for the trial court to allow the case to be reopened and additional evidence introduced in order to prevent a nonsuit, where counsel for the plaintiff has omitted evidence by accident, inadvertence, or even because of a mistake as to the necessity for offering a particular witness or particular evidence."

It is further stated in 88 *C. J. S.* 224 Sec. 108 that:

"It is within the sound discretion of the Court whether or not it will allow the case to be reopened for the further introduction of evidence after a motion or request for a nonsuit, to set aside the verdict, directed verdict, judgment, dismissal, peremptory instruction, or a demurrer to the evidence, or withdrawal of the case from the jury, and the case may be reopened after the court has announced its intention as to its ruling on the request, motion, or demurrer, or has granted it, or has denied it, or after the motion has been granted, if the order has not been written, or entered on the minutes or signed. In the exercise of this discretion the court should reopen the case to receive evidence inadvertently omitted, or evidence the admission of which is necessary for the proper and just disposition of the case."

The appellants contend that the attorney is the best judge of what evidence he desires the court to hear.

But is is discretionary with the court what further evidence it will hear after the case has been reopened. 88 *C.J.S.*, 226, par. 110. *Aling v. Weissman,* 59 A. 419.

In view of the broad powers granted to a trial court to further the ends of justice and the fact that the appellants were not prejudiced by the court's order or denied equal opportunities with the respondents, there can be no such clear abuse of discretion which would justify interference by an appellate court.

The evidence offered after the reopening of the case was clearly in the furtherance of justice to enable the trial court to render a just and proper decision. The fact that the appellants did not avail themselves of their opportunity to offer evidence does not render the trial court action a clear abuse of discretion.

POINT FOUR

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL BASED UPON THE ERRORS OF LAW COMMITTED BY THE COURT.

The decision or judgment of the trial court was supported by sufficient legal evidence to justify the same and it was according to law.

There were no errors of law occurring at the trial which would be prejudicial to the plaintiffs.

A recent Utah case, *Burton v. Zions Cooperative Mercantile Institution*, 249 Pac. (2nd) 514, states:

"The matter of granting or refusing a new trial rests in the sound discretion of the trial court, and the judgment thereon should be reversed only when there has been a plain abuse of said discretion."

Other Utah cases holding to the same effect are: *Callahan v. Simmons,* 64 Utah 250, 228 P. 892; *Lund v. District Court,* 90 Utah 433, 62 P. 2nd. 278; *Hepworth v. Covey,* 97 Utah 205, 91 P. 2nd. 507.

In *Beck v. Dutchman Coalition Mines Co.,* 269 P 2nd 867, 2 U. 2nd 104, it was held that:

"Trial courts have wide latitude in granting or denying motions for new trial."

"Order overruling motion for new trial must stand unless it is made affirmatively to appear that trial court erred."

Moulton v. Staats, 83 U. 197, 27 P 2nd 45.

What we have stated about the other points also applies to Point Four.

CONCLUSION

For the reasons herein stated, the judgment of the Lower Court should be affirmed.

Respectfully submitted,

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and
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Attorneys for Plaintiff and Respondents.